

1 Melvin B. Pearlston (SBN 54291)
2 Robert B. Hancock (SBN 179438)
3 Elizabeth D. Sonnichsen (SBN 321131)
4 PACIFIC JUSTICE CENTER
5 50 California Street, Suite 1500
6 San Francisco, California 94111
7 Tel: (415)310-1940
8 e-mail: robh@rbhancocklaw.com

9 Attorneys for Plaintiff
10 **ERIKA MCCARTNEY**

11
12 **SUPERIOR COURT OF CALIFORNIA**
13
14 **COUNTY OF SAN FRANCISCO**

15 ERIKA MCCARTNEY, in the public interest,) CIVIL ACTION NO. CGC-18-570587
16)
17 Plaintiff,) **[PROPOSED] CONSENT**
18) **JUDGMENT**
19 v.)
20 CHAMPLAIN CHOCOLATE COMPANY) [Cal. Health & Safety Code
21 a Vermont corporation; and Does 1 through 500) Sec. 25249.6, *et seq.*]
22 inclusive,)
23)
24 Defendants.)
25)
26)
27)
28)

1 **1. INTRODUCTION**

2 1.1 This action arises out of the alleged violations of California’s Safe Drinking Water
3 and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5, *et seq.*
4 (also known as and hereinafter referred to as “Proposition 65”) regarding the following products
5 (hereinafter, the “Covered Product”): Lake Champlain Organic Cocoa Powder; Lake Champlain
6 80% Dark Organic Chocolates; Lake Champlain 72% Dark Organic Chocolates; Lake Champlain
7 57% Dark Organic Chocolates; and Lake Champlain 54% Dark Organic Chocolates. Cadmium
8 and lead are subject to Proposition 65 warning requirements because they are listed as known to
9 the State of California to cause reproductive harm.

10 1.2 Plaintiff Erika McCartney (“MCCARTNEY”) is a California resident acting as a
11 private enforcer of Proposition 65. MCCARTNEY has brought this enforcement action in the
12 public interest against Champlain Chocolate Company, d/b/a Lake Champlain Chocolates
13 (“CHAMPLAIN CHOCOLATE COMPANY” or “Defendant”) concerning cadmium and lead in
14 the Covered Products pursuant to California Health and Safety Code Section 25249.7(d).
15 MCCARTNEY contends she is dedicated to, among other causes, helping safeguard the public
16 from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating
17 a safe environment for consumers and employees, and encouraging corporate responsibilities.

18 1.3. CHAMPLAIN CHOCOLATE COMPANY has sold the Covered Products in
19 California during the relevant period.

20 1.4 MCCARTNEY and CHAMPLAIN CHOCOLATE COMPANY are hereinafter
21 sometimes referred to individually as “Party” or collectively as the “Parties.”

22 1.5 On or about August 9, 2017, pursuant to California Health and Safety Code Section
23 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65 (“Notice
24 of Violations”) on the California Attorney General, other public enforcers, and CHAMPLAIN
25 CHOCOLATE COMPANY alleging violations of California Health and Safety Code Section
26 25249.6 with respect to unwarned exposures of cadmium arising from the sale and use of the
27 Covered Product in California. Defendant acknowledges it received the Notice of Violations.
28

1 1.6 After more than sixty (60) days passed since service of the Notice of Violations,
2 and with no designated governmental agency having filed a complaint against CHAMPLAIN
3 CHOCOLATE COMPANY with regard to the Covered Product or the Alleged Violations,
4 MCCARTNEY filed the complaint in this matter (“Complaint”) in this Court.

5 1.7 CHAMPLAIN CHOCOLATE COMPANY generally denies all material and
6 factual allegations contained in or arising from MCCARTNEY’s Notice of Violations and the
7 Complaint and asserts that it has various affirmative defenses to the claims asserted therein.
8 CHAMPLAIN CHOCOLATE CO. further specifically denies that the Plaintiff or California
9 consumers have been harmed or damaged by its conduct or the products it has sold or sells,
10 including the Covered Product.

11 1.8 The Parties enter into this Consent Judgment (“Consent Judgment”) in order to
12 settle, compromise, and resolve disputed claims and avoid prolonged and costly litigation. For
13 purposes of the approval and entry of this Consent Judgment only, the Parties stipulate that this
14 Court has jurisdiction over the subject matter of this Action and personal jurisdiction over the
15 Parties, that venue is proper in this Court, and that this Court has jurisdiction to enter this Consent
16 Judgment pursuant to the terms set forth herein.

17 1.9 Nothing in this Consent Judgment, nor compliance with its terms, shall constitute
18 or be construed as an admission by any of the Parties (or by any of CHAMPLAIN CHOCOLATE
19 COMPANY’s officers, directors, shareholders, employees, agents, subsidiaries, divisions,
20 affiliates, suppliers, or licensees) of any fact, conclusion of law, issue of law, violation of law,
21 fault, wrongdoing, or liability, including without limitation, any admission concerning any alleged
22 violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment
23 shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties have or may
24 have in any other or future legal proceeding.

25 1.10 The “Effective Date” of this Consent Judgment shall be the date upon which this
26 Consent Judgment, after having been fully executed by all of the Parties, has been approved and
27 entered by the Court.

1 on a sign or shelf label in a font no smaller than the largest type size used for other information on
2 the sign or a shelf label for similar products.

3 The Parties agree that should the OEHHA warning regulations change, that CHAMPLAIN
4 CHOCOLATE COMPANY may either conform with the OEHHA regulations or conform with
5 the terms provided in this Consent Judgment, and in so doing, will be in compliance with this
6 Consent Judgment.

7 The Parties agree that any units of the Covered Product containing cadmium or lead
8 concentration levels below the corresponding effective levels set forth in certain Consent Judgment
9 entered February 15, 2018, by the San Francisco Superior Court in *As You Sow v. Trader Joe's*
10 *Company, et al.*, Case No. CGC-15-548791, ("*As You Sow*") shall be exempt from the
11 requirements of this section 2, including the injunction in subsection 2.1. Unless otherwise
12 specified herein, the Parties further agree that the dates of performance for all obligations for any
13 Settling Defendant (as defined) in the *As You Sow* consent judgment shall apply to the instant
14 Consent Judgment, including, without limitation, that the "Compliance Date" herein shall be
15 February 15, 2019.

16 **3. REQUIRED MONETARY PAYMENTS**

17 3.1 CHAMPLAIN CHOCOLATE COMPANY shall issue the following payments and
18 send them to counsel for MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California
19 Street, Suite 1500, San Francisco, California 94111. The checks shall be payable to the following
20 parties and the payment shall be apportioned as follows:

21 3.2 \$11,500 as civil penalties pursuant to California Health and Safety Code Section
22 25249.7(b)(1) to be paid ten (10) business days after entry of the Consent Judgment. Of this
23 amount, \$8,625 shall be payable to OEHHA, \$2,136 shall be payable to MCCARTNEY, and \$739
24 shall be payable to CancerCare, a qualified 501(c)(3) charitable organization, dedicated to
25 providing financial aid to cancer patients for treatment costs. MCCARTNEY hereby waives any
26 statutory entitlement to penalties in excess of \$2,136. MCCARTNEY's counsel shall promptly
27 forward all checks to the payees indicated.

1 downstream entities and persons in the distribution chain of the Covered Product, including, but
2 not limited to Amazon.com, Inc. and Lucky Vitamin Corporation, and the predecessors, successors
3 and assigns of any of them (collectively, “Released Parties”), on the other hand, of any and all
4 direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
5 regulations for failure to provide Proposition 65 warnings of exposure to cadmium and lead from
6 the handling, use, or consumption of the Covered Product, and it fully resolves all claims that have
7 been or could have been asserted up to and including the Effective Date for the alleged failure to
8 provide Proposition 65 warnings for the Covered Product regarding cadmium and lead.

9 7.2 MCCARTNEY on her own behalf (and not in her role as a representative of the
10 public interest) further hereby releases and discharges CHAMPLAIN CHOCOLATE COMPANY
11 and the Released Parties, from any and all claims and causes of action and obligations to pay
12 damages, restitution, fines, civil penalties, payment in lieu of civil penalties and expenses
13 (including but not limited to expert analysis fees, expert fees, attorneys’ fees and costs)
14 (collectively, “Claims”) based on exposure to cadmium and lead from the Covered Product and/or
15 failure to warn about cadmium and lead in the Covered Product to the extent that the Covered
16 Product was sold by CHAMPLAIN CHOCOLATE COMPANY prior to the Effective Date.

17 7.3 Unless modified pursuant to Section 4 above, compliance with the terms of Section
18 2.1 and 2.2 of this Consent Judgment shall be deemed to constitute compliance with Proposition 65
19 regarding the Covered Product.

20 7.4 It is possible that other Claims not known to MCCARTNEY arising out of the facts
21 alleged in the Notices of Violations, the Complaint or the First Amended Complaint will develop
22 or be discovered. MCCARTNEY acknowledges on behalf of herself (and not in the role as
23 representative of the public interest) that the Claims released herein include all known and
24 unknown Claims and waives California Civil Code Section 1542 as to any such unknown Claims.
25 California Civil Code Section 1542 reads as follows:

26 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
27 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
28 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN**

1 **BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER**
2 **SETTLEMENT WITH THE DEBTOR.”**

3 MCCARTNEY acknowledges and understands the significance and consequences of this specific
4 waiver of the California Civil Code Section 1542.

5 7.5 MCCARTNEY, on the one hand, and CHAMPLAIN CHOCOLATE COMAPNY,
6 on the other hand, each release and waive all Claims they may have against each other for any
7 statements or actions made or undertaken by them in connection with the Notice of Violation, the
8 Complaint, or the allegations contained therein. However, this shall not affect or limit any party’s
9 right to seek to enforce the terms of this Consent Judgment. In addition, going forward, the Parties
10 shall not cause any aspect of the Action, the Notice of Violations, the Complaint, or the terms of
11 this Consent Judgment not otherwise available in the public record to be reported to the public or
12 any media or news reporting outlet. Any statement to the public or any media or news reporting
13 outlet shall be limited to what is available in the public record and documents publicly filed.
14 Regardless of the form or formality of a communication or statement to the media or other person
15 or entity, neither any Party nor their counsel shall disparage the other. Notwithstanding these
16 obligations, the Parties may make such disclosure regarding the Action and terms of this Consent
17 Judgment as necessary to auditors or as otherwise required by state or federal law.

18 **8. CONSTRUCTION AND SEVERABILITY**

19 8.1 The terms and conditions of this Consent Judgment have been reviewed by the
20 respective counsel for the parties prior to its signing, and each party has had an opportunity to fully
21 discuss the terms and conditions with its counsel. In any subsequent interpretation or construction
22 of this Consent Judgment, the terms and conditions shall not be construed against any Party.

23 8.2 In the event that any of the provisions of this Consent Judgment is held by a court
24 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
25 affected.

26 8.3 The terms and conditions of this Consent Judgment shall be governed by and
27 construed in accordance with the laws of the State of California.

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APPROVED AS TO FORM:

PACIFIC JUSTICE CENTER

Dated: 11/14/18

By: 
Robert B. Hancock
Attorneys for Plaintiff

Dated: 11/7/2018

LYNN, LYNN, BLACKMAN &
MANITSKY, P.C.

By: _____
Andrew D. Manitsky
Attorneys for Defendant